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**UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA**

STEM, INC.,
Plaintiff,

v.

SCOTTSDALE INSURANCE
COMPANY, an Ohio corporation,
DOES 1 through 20, inclusive,
Defendants.

Case No.: 3:20-cv-02950-CRB

**ADMINISTRATIVE MOTION FOR
AN ORDER PERMITTING
DEFENDANT SCOTTSDALE
INSURANCE COMPANY TO FILE
A SECOND MOTION FOR
SUMMARY JUDGMENT**

Pursuant to Local Rules 7-11 and 79-5, defendant Scottsdale Insurance Company (“Scottsdale”) respectfully moves for an Order permitting Scottsdale to file a second Motion for Summary Judgment (“Motion”). The basis for this administrative motion is that if Scottsdale’s Motion is successful, there will be no need for a trial in this matter, as more particularly set forth below.

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION AND SUMMARY OF ARGUMENT

Plaintiff Stem, Inc. (“Stem”) filed this action alleging that it is entitled to insurance coverage under a Business and Management Indemnity Policy issued to Stem by Defendant Scottsdale Insurance Company (“Scottsdale”) for a lawsuit filed on May 12, 2017, entitled *Reineccius, et al. v. Rice, et. al.*, against its directors (“Underlying Action”). Stem’s complaint alleges the following four claims for relief: (1) Breach of Contract (the 2013-2014 Policy); (2) Breach of Contract (the 2016-2017 Policy); (3) Tortious Breach of the Implied Covenant of Good Faith and Fair Dealing; and (4) Declaratory Relief.

11 On March 25, 2021, Stem and Scottsdale filed cross-motions for partial
12 summary judgment/summary judgment. Stem argued that the Underlying Action
13 triggered Scottsdale's defense obligation and that the 2017 Buzby Loan Claim is a
14 separate claim that triggered Scottsdale's defense obligation under the 2016-2017
15 policy. Scottsdale argued in its motion for summary judgment that it did not owe
16 Stem's directors a duty to defend under any of its policies, and/or that its denial was
17 not unreasonable or without proper cause.

18 On May 3, 2021, the Court issued an Order granting in part and denying in part
19 the parties' respective motions. Dkt. 51. The Court ruled that Stem was entitled to
20 partial summary judgment with respect to the 2017 Buzby Loan Claim, but otherwise
21 denied Stem's motion. The Court further ruled that Scottsdale was entitled to partial
22 summary judgment with respect to the 2013 Series B Financing Claim, and was also
23 entitled to partial summary judgment with respect to Stem's claims for bad faith and
24 punitive damages. The Court held that the 2017 Buzby Loan Claim triggered
25 Scottsdale's duty to defend. The Court further ordered that the following dates be
26 vacated: (1) the June 13, 2021 trial date; (2) the May 27, 2021 pre-trial conference;
27 (3) the April 30, 2021 deadline for filing dispositive motions; and (4) the May 14,
28 2021 expert discovery cut-off date.

1 The remaining issues for trial are whether there is a potential for coverage for
 2 the 2017 Buzby Loan, and what are the reasonable and necessary attorney's fees and
 3 costs incurred for the defense of Buzby in connection with the 2017 Buzby Loan
 4 claim. However, there is no potential for coverage for the 2017 Buzby Loan claim
 5 because it does not allege a Loss as that term is defined by the Policy. If Scottsdale
 6 successfully proves this in its Motion, there will be no need for a trial.

7 **II. SCOTTSDALE'S PROPOSED MOTION FOR SUMMARY**

8 **JUDGMENT WILL ALLEVIATE THE NEED FOR A TRIAL**

9 Scottsdale proposes to file a second motion for summary judgment concerning
 10 whether the Buzby Loan Claim alleges a Loss as that term is defined by the Policy.
 11 Stem claims the motion is a motion for reconsideration, but the Court did not address
 12 these issues. In fact, the Court specifically declined to decide the issue of "Loss" with
 13 respect to the 2019 settlements, but an order that the 2017 Buzby Loan does not allege
 14 a Loss would eliminate the need for a trial. Dkt. 51, p. 22, fn. 7.

15 Plaintiffs in the underlying action contend that Buzby breached his fiduciary
 16 duties by making a short term loan to Stem in 2017 at a high interest rate. The 2017
 17 Buzby Loan claim is not potentially covered because it does not allege a Loss as that
 18 term is defined by the Policy. Section B.7. of the Policy defines Loss and states that
 19 "Loss does not include: b. matters uninsurable under the laws pursuant to which this
 20 Policy is construed." In California, claims for restitution and disgorgement are
 21 uninsurable as a matter of law because "Damages within the meaning of an insurance
 22 contract do not include the restoration of an ill-gotten gain." *Bank of the West v.*
23 Superior Court, 2 Cal.4th 1254, 1270 (1992).

24 "Disgorgement of profits is particularly applicable in cases dealing with breach
 25 of a fiduciary duty, and is a logical extension of the principle that public officials and
 26 other fiduciaries cannot profit by a breach of their duty. Where a person profits from
 27 transactions conducted by him as a fiduciary, the proper measure of damages is full
 28 disgorgement of any secret profit made by the fiduciary regardless of whether the

1 principal suffers any damage. [Citations.]” *County of San Bernardino v. Walsh*, 158
 2 Cal.App.4th 533, 543 (2007); *Level 3 Comms. v. Federal Ins. Co.*, 272 F.3d 908,
 3 910–11 (7th Cir.2001)(holding that a policyholder does not incur an insurable “loss”
 4 when it is compelled to return allegedly ill-gotten gains in connection with the
 5 purchase or sale of a company)(citing cases).

6 The court has discretion to permit multiple motions for summary judgment.
 7 *Citizens for Free Speech, LLC v. County of Alameda*, 194 F.Supp.3d 968, 970 (N.D.
 8 Cal. 2016). The denial of an insurer’s motion for summary judgment on the duty to
 9 defend does not necessarily mean the insurer has a duty to defend, and an insurer
 10 may still prove the lack of such a duty at trial. *McMillin Companies, LLC v.*
 11 *American Safety Indemnity Co.*, 233 Cal.App.4th 518, 533 (2015) (duty to defend on
 12 summary judgment not established where court did not cite to a factual dispute).
 13 Thus, Scottsdale is still entitled to prove that there is no potential for coverage for
 14 the Underlying Action based upon issues not addressed by the court. However,
 15 Scottsdale’s proposed motion could eliminate the need for a trial. Moreover, Stem
 16 also proposes to file a second motion for summary judgment. To the extent Stem is
 17 permitted to file such a motion, it would be unfair to preclude Scottsdale from also
 18 filing a second motion for summary judgment.

19 **III. CONCLUSION**

20 For the foregoing reasons, Scottsdale respectfully requests that its motion be
 21 granted and that it be permitted to file a second motion for summary judgment.
 22

23 DATED: June 7, 2021

COZEN O’CONNOR

24 By: /s/ Valerie D. Rojas

25 Valerie D. Rojas

26 Angel Marti, III

27 Attorneys for Defendant

28 SCOTTSDALE INSURANCE COMPANY